COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
NO. 2015-SC-000159-D
(2013-CA-001246)

KENTUCKY RETIREMENT SYSTEMS — APPELLANTS

v.

CHARLES WIMBERLY — APPELLEE

BRIEF FOR APPELLEE CHARLES WIMBERLY

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Brief has been served on the following persons this 18th day of January 2016:

Angela Stevens
Appeals Coordinator
Kentucky Retirement Systems
1260 Louisville Road
Frankfort, KY 40601

Hon. Thomas Wingate
Franklin Circuit Court Judge
222 St. Clair Street
Frankfort, KY 40601

Hon. Sam Givens
Clerk of the Court of Appeals
360 Democrat Drive
Frankfort, KY 40601

I further certify that the record in this case was not withdrawn by counsel for the Appellee.

JOHN GRAY
John Gray

INTRODUCTION

This is the case of Charles Wimberly, whose reapplication for disability retirement benefits was disapproved by the Kentucky Retirement Systems.

On Appeal, the Franklin Circuit Court, on Motion to Amend, Alter or Vacate, reversed the Retirement Systems' disapproval of Mr. Wimberly's reapplication and the Kentucky Court of Appeals Affirmed the Franklin Circuit Court's reversal.

The Retirement Systems thereafter sought Discretionary Review from the Kentucky Supreme Court.

Discretionary Review was granted and Mr. Wimberly's case is now before the Kentucky Supreme Court.

STATEMENT CONCERNING ORAL ARGUMENT

Mr. Wimberly would request oral argument in order to more fully explain his position regarding the facts and law in his case.

COUNTER STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Statutory Provisions

KRS 61.600(1), which governs claims for disability retirement benefits, provides that any person may qualify to retire on disability, subject to the following conditions:

> (a) The person shall have sixty (60) months of service, twelve (12) of which shall be current service credited under KRS 16.543(1), 61.543(1), or 78.615(1); [Mr. Wimberly had the required 60 months of service, 12 of which were current service credited under KRS 61.543(1).]
>
> (b) For a person whose membership date is prior to August 1, 2004, the person shall not be eligible for an unreduced retirement allowance; [Although Mr. Wimberly had a membership date prior to August 1, 2004, he was not eligible for an unreduced retirement allowance.]
>
> (c) The person's application shall be on file in the retirement office no later than twenty-four (24) months after the person's last day of paid employment, as defined in KRS 61.510, in a regular full-time position, as defined in KRS 61.510 or 78.510. [Mr. Wimberly easily filed both his first and his reapplication within 24 months of his last day of paid employment]; and
>
> (d) The person shall receive a satisfactory determination pursuant to KRS 61.665. [Although Mr. Wimberly did not receive a satisfactory determination pursuant to KRS 61.665, the Franklin Circuit Court subsequently reversed Mr. Wimberly's unsatisfactory determination on Appeal and awarded him the disability retirement benefits to which he was entitled to[1].]

KRS 61.600(3) additionally provides that:

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[1] A satisfactory determination pursuant to KRS 61.665 means that the claimant's application for disability retirement benefits has been approved by the Board of the Kentucky Retirement Systems.

Pursuant to KRS 61.665(4) the Board has established an appeals committee which acts upon the recommendations and reports of the Board's hearing officers on behalf of the Board.

(3) Upon the examination of the objective medical evidence by licensed physicians pursuant to KRS 61.665, it shall be determined that:
(a) The person, since his last day of paid employment, has been mentally or physically incapacitated to perform the job, or jobs of like duties, from which he received his last paid employment. In determining whether the person may return to a job of like duties, any reasonable accommodation by the employer as provided in 42 U.S.C. sec. 12111(9) and 29 C.F.R. Part 1630 shall be considered. [Mr. Wimberly requested accommodations that would enable to continue performing his job as a TARC bus driver, but his employer determined that because of his medical condition, he was unable to perform the essential functions of the position of Coach Operator and could not therefore be accommodated. (A.R., pages 14-15).];

(b) The incapacity is a result of bodily injury, mental illness, or disease. For purposes of this section, "injury" means any physical harm or damage to the human organism other than disease or mental illness;
(c) The incapacity is deemed to be permanent[2]; and
(d) The incapacity does not result directly or indirectly from bodily injury, mental illness, disease, or condition which pre-existed membership in the system or reemployment, whichever is most recent. For purposes of this subsection, reemployment shall not mean a change of employment between employers participating in the retirement systems administered by the Kentucky Retirement Systems with no loss of service credit. [The objective medical evidence that was introduced in Mr. Wimberly's case showed that his disability was **not** related to a pre-existing condition.]

Chronology

Prior to becoming disabled Charles Wimberley, was a bus driver for the Transit Authority of River City (TARC) in Louisville.

[2] KRS 61.600(5)(a)(1) provides that an incapacity shall be deemed to be permanent if it is expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months from the person's last day of paid employment in a regular full-time position. [The operative 12 month period for Mr. Wimberly was from his last day of paid employment of July 25, 2002 through July 25, 2003.]

On February 2, 2003, Mr. Wimberly filed an application for disability retirement benefits along with supporting medical records - claiming incapacity to drive a commercial bus because of his disabling heart condition.

Mr. Wimberly's medical records were reviewed by the Retirement Systems' medical examiners, who after their review recommended that his claim for disability retirement benefits be denied.

Mr. Wimberly then requested a formal administrative hearing to further pursue his claim.

The evidence of record from his administrative hearing reflected that:

- Prior to going to work for TARC as a bus driver in September 21, 1991, Mr. Wimberly's pre-employment records showed no complaints, diagnosis or treatment for heart disease or alcohol abuse.

- In October 29, 2001 Mr. Wimberly was knocked unconscious when a car slammed into the bus he was operating. Suffering from post-concussive syndrome, he was placed off work on October 21, 2001. (A.R., 286 – 287).

- Due to his disabling condition, the Social Security Administration awarded Mr. Wimberly total permanent disability benefits due to his cardiac condition effective the day of the accident – October 29, 2001. (A.R., page 473).

- While still disabled, on March 16, 2002, Mr. Wimberly suffered heart failure and was diagnosed by cardiologist Dr. John Kenny with cardiomyopathy and congestive heart failure, leading Dr. Kenny to disable Wimberly from work. Significantly, Dr. Kenny noted that Mr.Wimberly's medical history showed no hypertension, stroke, heart disease or murmurs. (A.R., page 290).

Dr. Kenny continued to treat Mr. Wimberly's heart condition and extended his off work status through his July 25, 2002 last day of employment and thereafter restricted him from driving a public bus for the next twelve months, as reflected by the following records:

- July 25, 2002.
  Charles Wimberly's last day of paid employment. (Exhibit C).

- August 19, 2002.

Dr. Kenny releases Mr. Wimberly to return to work with the restriction that he only performs light duty work and that he does **no driving**. (A.R., page 292).

- November 5, 2002.
  Report from Dr. Kenny showing that Charles was **restricted from driving** as of November 5, 2002. (A.R. page 289).

- December 9, 2002.
  Report from Dr. Kenny noting that although Charles' cardiovascular status was stable, Dr. Kenny was "concerned, however, with his **inability to drive a bus**." (A.R. pages 581 – 582)

- December 10, 2002.
  Report from Dr. Kenny showing that he still restricted Charles **from driving** as of December 10, 2002. (page 291 of the record).

- December 12, 2002.
  Report from Commonwealth Cardiologists, P.S.C. showing that Charles was released to return to work but was **restricted from driving**. (page 288 of the record).

- February 24, 2003.
  Request for accommodations to TARC submitted by Charles Wimberly. (page 013 of the record).

- February 24, 2003.
  Report showing that TARC informed Charles that: "Based on medical documentation it has been determined that [you are] **unable to perform the essential functions of the position of Coach Operator**" and that "Accordingly, TARC is unable to reasonably accommodate the functional limitations caused by [your] disability. (pages 014 and 015 of the record).

- April 21, 2003.
  Report showing that Dr. Kenny diagnosed Charles with having syncope and having treated him on April 17 – 18, 2003. Dr. Kenny further reported that Charles was **disabled from performing his normal occupation**. (page 293 of the record).

- July 22, 2003.
  Report from Dr. Jeffery Schoen stating that: "My assessment is that Charles is doing very well. His cardiomyopathy has improved." In spite of this improvement, Dr. Schoen still felt that while Charles could drive his own car, he should **not be allowed to drive commercially again**. As stated by Dr.

Schoen: "At this time he is asking if he can drive a car. He has not had any problem for some time so I think it probably is okay for him to drive his own car. I don't think he will be able to drive commercially again." (page 656 of the record).

- July 25, 2003
  End of 12 month period from Mr. Wimberly's last day of paid employment. Qualification for KERS disability retirement determined as of this date.

- November 18, 2003.
  Report from Dr. Schoen stating that although Charles' condition had improved, he still had significant but mild cardiomyopathy and that he tired easily and was able to only do mild physical activity. Based on this, Dr. Schoen thought it advisable for Charles to **avoid extreme temperatures and a high stress job and moderate to heavy physical exertion**. (page 899 of the record).

The sum and substance of this uncontroverted objective medical evidence is that from his last day of paid employment on July 25, 2002, Mr. Wimberly was continuously medically disabled from driving a public transportation bus for twelve continuous months and beyond.

Stated differently, due to his cardiac condition, as well concerns over his ability to safely operate a bus, Mr. Wimberly's physicians would not clear him to return to commercial driving and, without medical clearance from his physicians, TARC would not let Mr. Wimberly drive its buses.

In fact, in response to Mr. Wimberly's condition and restrictions, on February 24, 2003 Mr. Wimberly's employer completed a "Reasonable Accommodation Determination" form, stating: **"Based on medical documentation it has been determined that the above employee is unable to perform the essential functions of the position of Coach Operator".** (pages 14-15).

In spite of this uncontradicted medical evidence, the hearing officer recommended that Mr. Wimberly's claim for disability retirement benefits be denied, finding that:

> It is found that the Claimant's heart condition has improved substantially and, accordingly while Dr. Schoen says that Claimant cannot drive commercially, he has not set forth any basis for this opinion, and further allows him to drive privately, which would still jeopardize the traveling public, as well as the Claimant. (See September 19, 2005 Recommended Order, Finding of Fact 16, A.R. page 1003).

At this point in time, Mr. Wimberly had two (2) options:

1. He could wait for the Retirement Systems Disability Appeals Committee [the Committee] to act upon the hearing officer's recommendation[3]; or

2. He could reapply for disability retirement benefits pursuant to KRS 61.6000(2), which provides a person's disability reapplication based on the same claim of incapacity shall be accepted and reconsidered for disability if accompanied by new objective medical evidence and if the reapplication is filed no later than twenty-four (24) months after the person's last day of paid employment.

Rather than wait for the Retirement Systems' Appeals Committee to act on the hearing officer's recommendation, Mr. Wimberly chose to reapply for disability retirement benefits and on June 4, 2004, filed a reapplication for disability retirement benefits along with **new** objective medical evidence that showed that he was permanently disabled - thereby effectively rendering the first hearing officer's recommendation moot.

Apparently unaware that Mr. Wimberly had reapplied his claim for benefits, the Appeals Committee entered what it styled a "final order" denying Mr. Wimberly's first application on July 28, 2004 - a "final order" which was also rendered moot by Mr. Wimberly's reapplication, with the consequence of this being that there was not a final and appealable order in place when Mr. Wimberly filed his reapplication[4].

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[3] KRS 61.665(4) provides that the board may establish an appeals committee whose members shall be appointed by the chair and who shall have the authority to act upon the recommendations and reports of the hearing officer pursuant to this section on behalf of the board.

[4] KRS 61.665(5) provides that any person aggrieved by a final order of the board may seek

Mr. Wimberly's medical records were then again reviewed by the Systems' medical examiners, who again recommended that his claim be denied.

Following the medical examiners' recommendation that his reapplication be denied, Mr. Wimberly, requested a second formal administrative hearing.

As can be seen at page 3 of the second hearing officer's Report and Recommended Order, the hearing officer adopted the exhibits from Mr. Wimberly's first hearing into the record of Mr. Wimberly's reapplication hearing, thereby complying with KRS 61.665(3)(d) which requires that the Retirement Systems base its decisions on the record as a whole, as follows:

> The record in this case consists of Claimant's testimony at the hearing and Exhibits 1 – 57, with Exhibits 1 – 35 being from the previous records. Exhibits 1 – 35 are adopted herein due to the fact that the Claimant did not appeal that decision. (page 988 of the record on appeal).

It is clear, therefore, that the hearing officer for Mr. Wimberly's reapplication hearing, reviewed the "old" evidence of record from Mr. Wimberly's first hearing, in addition to the "new" evidence that Mr. Wimberly submitted with his reapplication – a summary of Mr. Wimberly's new evidence is found at pages 6 – 16 of the hearing officers' September 19, 2005 Report and Recommended Order. (A copy of pages 6 – 16 of the hearing officers' Report and Recommended Order are included in the Appendix of this Brief which are recorded as pages 991 - 1001 of the record on appeal. .Following Mr. Wimberly's reapplication hearing, the hearing officer recommended that Mr. Wimberly's reapplication be denied – finding that:

> 13. It is found that the Claimant's condition at the time of the second application has improved based on the medical information

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judicial review after all administrative appeals have been exhausted by filing a petition for judicial review in the Franklin Circuit Court in accordance with KRS Chapter 13B.

submitted as compared to the information provided at the first hearing.

14. The Claimant contends that his heart condition is not related to his alcohol consumption and has submitted medical information indicating that there was an error in reporting that his condition was related to alcohol usage. The undersigned hearing officer cannot make a finding as to whether or not his use of alcohol is an indirect cause of his cardiac condition, except for the fact that Dr. Kenny so indicated initially.

15. All of the evidence submitted is substantially after his last date of paid employment and, as noted by counsel for the retirement systems, is now an attempt to change records based on statements of the Claimant without objective evidence.

16. It is found that the Claimant's heart condition has improved substantially and, accordingly, while Dr. Schoen says that the Claimant cannot drive commercially, he has not set forth any basis for this opinion, and further allows him to drive privately, which still would jeopardize the travelling public, as well as the Claimant.

17. The Claimant has failed to set forth objective medical evidence to support his application for disability retirement benefits.

Not satisfied with the Hearing Officer's findings, the Appeals Committee remanded the case back to the hearing officer with instructions to make specific findings regarding whether or not any of Mr. Wimberly's conditions were pre-existing.

On remand the hearing officer adopted his previously filed recommendation that Mr. Wimberly's claim be denied and added to it the finding that Mr. Wimberly had a pre-existing alcohol condition that at a minimum indirectly affected Mr. Wimberly's cardiac condition.

Mr. Wimberly then filed exceptions to the hearing officer's recommendation stating that:

> The Hearing Officer erroneously characterized the claimant's past potential alcohol abuse as indirectly or directly affecting his

> cardiac condition. The Hearing Officer relied primarily upon his prior Findings in a prior claim. There was new & material medical proof submitted with the current case that disputed alcoholism.

The Appeals Committee thereafter adopted the second Hearing Officer's amended report and issued a final order denying Mr. Wimberly's claim.

Mr. Wimberly then filed a Complaint and Petition for Review and Appeal with the Franklin Circuit Court.

On appeal, the Franklin Circuit Court initially affirmed the Retirement System's decision to deny Mr. Wimberly's claim on the grounds of administrative *res judicata* – which the Retirement Systems had raised in its Brief for the first time during these entire proceedings.

Mr. Wimberly then filed a Motion to Alter, Amend, or Vacate with the Circuit Court, in which he argued that administrative *res judicata* did not apply to his case because he had complied with KRS 61.600(2) by filing his reapplication within 24 months of his last day of paid employment and by accompanying his reapplication with new objective medical evidence.

The Circuit Court granted Mr. Wimberly's Motion and entered an Opinion and Order that held that administrative *res judicata* did not apply in Mr. Wimberly's case because he had submitted new medical evidence along with his reapplication which showed that he was permanently disabled and that his disabling heart condition was not either directly or indirectly related to pre-employment use of alcohol.

The Retirement Systems struck back by filing a Motion to Amend, Alter or Vacate of its own, which the Circuit Court denied.

The Retirement Systems then appealed to the Court of Appeals - which entered an opinion affirming the Circuit Court, but with Judge VanMeter writing a dissent on the pre-existing condition issue.

The Retirement Systems then filed a Motion for Discretionary Review – which was granted.

ARGUMENTS

On Discretionary Review the Retirement Systems makes the following arguments:

1. The Court of Appeals erred when it improperly failed to apply the doctrine of administrative *res judicata.*

2. The Court of Appeals erred when it failed to properly apply established case law with regard to issue preservation, and consequently, erroneously considered an unpreserved argument.

3. The dissent in the Court of Appeals' Opinion regarding the issue of alcoholism as a pre-existing condition should be given further consideration as a clarification of the holding in *Kentucky Retirement Systems v. Brown,* 336 S.W. 3d (Ky. 2011).

4. The Court of Appeals erred in concluding that the Agency's findings were not supported by substantial evidence.

Res Judicata Argument.

The Retirement Systems first argues that:

> The Court of Appeals erred when it improperly failed to apply the doctrine of administrative *res judicata.*

Mr. Wimberly submits in Response that:

- The Retirement Systems has failed to preserve this issue for review.

- Even if preserved, the doctrine of administrative *res judicata* does not apply to Mr. Wimberly's reapplication because his reapplication, which was accepted and reconsidered without objection by the Retirement Systems, was filed within 24

months of his last day of paid employment and was accompanied by new objective medical evidence. See KRS 61.600(2) which provides that: A person's disability reapplication based on the same claim of incapacity shall be accepted and reconsidered for disability if accompanied by new objective medical evidence. The reapplication shall be on file in the retirement office no later than twenty-four (24) months after the person's last day of paid employment in a regular full-time position.

Mr. Wimberly would further submit that:

- Although a final order was entered regarding his first application, it was entered after his reapplication had been filed and was therefore moot.

- The evidence of record for his reapplication necessarily included the record from his first application, as well as the evidence of record from his reapplication. See KRS 61.665(3)(d) which provides that: A final order of the board shall be based on substantial evidence appearing in the record as a whole and shall set forth the decision of the board and the facts and law upon which the decision is based.

Failure to Preserve

The Retirement Systems has not preserved the issue of administrative *res judicata* for the following reasons:

- The Retirement Systems failed to raise the issue of *res judicata* when it accepted and processed Charles Wimberly's reapplication for disability retirement benefits.

- The Retirement Systems' medical examiners failed to raise the issue of administrative *res judicata* when it reviewed Mr. Wimberly's reapplication.

- The Retirement Systems failed to raise the issue of administrative *res judicata* at the hearing that was held regarding Mr. Wimberly's reapplication.

- The Retirement Systems failed to object to the introduction of the evidence of record from Mr. Wimberly's first application into the record of Mr. Wimberly's reapplication.

- The Retirement Systems failed to raise the issue of administrative *res judicata* in the Position Paper that it filed with the hearing officer following Mr. Wimberly's reapplication hearing.

- The Retirement Systems' hearing officer failed to cite administrative *res judicata* as a reason for recommending that Mr. Wimberly's reapplication be denied.

- The Retirement Systems failed to raise the issue of administrative *res judicata* before the Board by failing to file exceptions to the hearing officer's recommended order[5].

- The Board failed to cite *res judicata* as a basis for its final decision denying Mr. Wimberly's reapplication for disability retirement benefits.

- The Retirement Systems failed to raise the issue of administrative *res judicata* in the Answer that it filed to Mr. Wimberly's Complaint and Petition for Review with the Franklin Circuit Court.

- The Retirement Systems did not raise the issue of *res judicata* until it filed its Appellants' Brief with the Franklin Circuit Court.

Therefore, whether you call it *laches or estoppel by laches* or *sleeping on their rights* – it is clear from the record that the Retirement Systems failed to preserve the issue of res *judicata* for review judicial review.

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[5] See *Rapier v. Philpot*, 130 S.W.3rd 563-564 (KY. 2004) for the holding that: "Under Chapter 13B, the filing of exceptions provides the means for preserving and identifying issues for review by the agency head. In turn, filing exceptions is necessary to preserve issues for further judicial review. Under Kentucky law, this rule of preservation precludes judicial review of any part of the recommended order not excepted to and adopted in the final order. Thus, when a party fails to file exceptions, the issues the party can raise on judicial review under KRS 13B.140 are limited to those findings and conclusions contained in the agency head's final order that differ from those contained in the hearing officer's recommended order."

See also *Givens v. Commonwealth*, 359 S.W.3d 454, 465 (Ky. App. 2011) for the holding that: "A party to an administrative hearing, therefore, must except to a recommended order as required by statute and, despite Givens' argument to the contrary, judicial review of the final order specifically is limited to a review of *any factual or legal "findings and conclusions"* which differ from those which were recommended." Emphasis added.

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The Kentucky Court of Appeals has held that:

> It is a maxim of the law that "he who is silent when he should have spoken, shall not be afterward heard to assert the claim on which, on proper occasion, he failed to disclose." *Stohschein v. Crager*, 258 S.W. 3rd 25, 29 (Ky. App., 2007).

Charles Wimberly's case, therefore, is a classic example of the Retirement Systems sleeping on its rights by failing to raise the issue of *res judicata* at **any** occasion during the administrative proceedings below.

Having clearly failed to preserve the issue of *res judicata,* the Kentucky Supreme Court should Affirm the decision of the Kentucky Court of Appeals.

Hoskins, Holland and Howard.

The Retirement Systems argues that the case of *Hoskins v. Kentucky Retirement Systems,* 2009-CA-000905), *Holland v. Kentucky Retirement Systems* (2001-CA-000484), and *Howard v. Kentucky Retirement Systems* (2012-CA-001488) represent a decade of established case law that has consistently held that the doctrine of *res judicata* applies to disability determinations made by the Kentucky Retirement Systems[6].

Mr. Wimberly submits in Response that in addition to *Hoskins, Holland and Howard* all being unpublished opinions, none of these cases are applicable to his case for the following reasons:

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[6] Ironically, the Retirement Systems also cites the case of *Hollen v. Kentucky Retirement Systems,* 2009-CA 000119) at page 13 -14 in support of its claim that the Court of Appeals considered an unpreserved argument – without bothering to mention that the Board did not apply *res judicata* to Ms. Hollen's reapplication.

Hoskins

As to the *Hoskins* case, the Court of Appeals – for unknown reasons – relied on the 64 year old case of *E.F. Prichard Co. vs. Heidelberg Brewing Co.*, 234 S.W.2nd 487 (Ky. App., 1950), in holding that:

> The doctrine of *res judicata* prevents the relitigation of the same issues in a subsequent appeal and includes every matter belonging to the subject of the litigation which could have been, as well as those which were, introduced in support of the contention on the first **appeal**. *Hoskins* at page 8. Emphasis added.

The differences though between the facts in the *Heidelberg* case and the facts in Mr. Wimberly's case are striking.

To begin with the *Heidelberg* case was not a disability retirement case governed by KRS 61.600(2), which as explained above, makes provision for the reapplication of claims for disability retirement benefits.

Rather, the *Heidleberg* case arose from an action for a declaration of rights - while Mr. Wimberly's case arose from an administrative proceeding.

Beyond that, the *Heidelberg* case was an **appeal** from a trial court to the Kentucky Court of Appeals – whereas Mr. Wimberly's case was not an appeal but was an **original action** before the Retirement Systems' Board upon reapplication for disability retirement benefits under KRS 61.600(2).

It is therefore hard to imagine how the *Heidelberg* case could have any applicability to a disability retirement proceeding where – as permitted by statute - a claimant has reapplied for disability benefits.

Further, *Hoskins* is clearly distinguishable from Charles Wimberly's case because in *Hoskins* the Board concluded that Kathy Hoskins' reapplication for disability retirement benefits was barred by *res judicata.*

In Charles Wimberly's case, there was no such conclusion by the Board, and as has been pointed out above - the Retirement Systems failed to raise the issue of *res judicata* at any point in the administrative proceeding below and in fact only first raised the issue at the circuit court level[7].

Holland

With all due respect, the Retirement Systems' reliance on the *Holland* case is completely misplaced because *Holland* [which was decided in 2003] was decided under a version of KRS 61.600 which has since been amended.

Prior to 1994, KRS 61.600(1) provided that any person could qualify to retire on disability, subject to the following conditions:

a) The person shall have sixty (60) months of service, twelve (12) of which shall be current service credited under KRS 16.543(1), 61.543(1) or 78.615(1);
b) The person shall be less than normal retirement age;
c) The person's application shall be on file in the retirement office no later than twelve (12) months after the person's last day of paid employment in a regular full-time position; and
d) The person shall receive a satisfactory determination pursuant to KRS61.665.

However, in 1994 KRS 61.600(1) was amended by adding a section (e) which read:

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[7] It has been held that the doctrine of *res judicata* is an affirmative defense. See *Independent Order of Foresters v. Chauvin ., Inc.*, 175 S.W. 3rd 610, Ky., (2005). That being the case, it was incumbent on the Retirement Systems to raise the issue of *res judicata* during Mr. Wimberly's reapplication process. The Retirement Systems, however, failed to do this, thereby, clearly waiving this issue.

> (e) No disability application shall be accepted for any person who has previously applied for and been denied disability benefits unless an application based on the same claim of incapacity is accompanied by evidence of a substantial change in the person's condition which shall satisfy subsection (4) of the section. The application shall be on file in the retirement office no later than twenty-four (24) months after the person's last day of paid employment in a regular full-time position.

In 1998, KRS 61.600(1)(e) was further amended to read:

> (e) No disability application based on the same claim of disability shall be accepted and considered for disability for any person who has previously applied for and been denied disability benefits unless it [an application based on the same claim of incapacity] is accompanied by evidence of a substantial change in the person's condition which shall satisfy subsection (4) of the section. The application shall be on file in the retirement office no later than twenty-four (24) months after the person's last day of paid employment in a regular full-time position. Bracketed wording is what was added. Underline wording is what was deleted.

KRS 61.600(1)(e) was again amended in 2000 to read:

> (e) [A] No [person's] disability application based on the same claim of disability shall be accepted and reconsidered [considered] for disability [if] for any person who has previously applied for and been denied disability benefits unless it is accompanied by [new objective medical evidence] of a substantial change in the person's condition which shall satisfy subsection (4) of the section. The application shall be on file in the retirement office no later than twenty-four (24) months after the person's last day of paid employment in a regular full-time position. Bracketed wording is what was added. Underline wording is what was deleted.

In 2004, KRS 61.600(1)(e) was renumbered as KRS 61.600(2) and was amended

to read:

> [(2)] e A person's disability [reapplication] application based on the same claim of disability shall be accepted and reconsidered for disability if accompanied by new objective medical evidence. The

> [reapplication] application shall be on file in the retirement office no later than twenty-four (24) months after the person's last day of paid employment in a regular full-time position.

Therefore, regarding reapplications, KRS 61.600(2) provides today – as it has since 2004 – that:

> (2) A person's disability reapplication based on the same claim of incapacity shall be accepted and reconsidered for disability if accompanied by new objective medical evidence. The reapplication shall be on file in the retirement office no later than twenty-four (24) months after the person's last day of paid employment in a regular full-time position.

As can be plainly seen then, the history of the law to be applied to reapplications based on the same claim of disability was and is as follows:

- Prior to 1994 there were no special requirements regarding reapplications.
- From 1994 through 2004 persons reapplying for disability retirement benefits were required to show a substantial change in the person's condition.
- Since 2004 persons reapplying for disability retirement benefits are only required to accompany their reapplication with new objective medical evidence.

Accordingly, if *res judicata* ever applied to disability retirement reapplications, it could have only applied to the law as it existed prior to 2004 – when *Holland* was decided - and could have only then applied if the claimant failed to show a change in his condition.

Howard

In *Howard*, the Court of Appeals simply held - without any explanation, reasoning or analysis - that:

> It must also be noted that because this is Howard's second application for benefits, *res judicata* applies; therefore we only

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review denial of benefits as it relates to the new evidence submitted with the second application.

The Howard court, though, was wrong on two counts:

1. As already explained, *res judicata* does not apply to disability retirement cases such as Mr. Wimberly's where the claimant reapplies for benefits within 24 months of his last date of paid employment and submits new objective medical evidence to support his claim. KRS 61.600(2)

2. KRS 61.665(3)(d) requires that the Board review the record as a whole – which, as in Mr. Wimberly's case, included the medical evidence from the claimant's first application.

The record as a whole.

In *Hoskins* the court held that:

> The Board properly refused to consider evidence and arguments which were presented in the first application. We find no error in this decision.

Likewise, in *Howard,* the court held that:

> [when] "*res judicata* applies ... we only review denial of benefits as it relates to the new evidence submitted with the second application."

Mr. Wimberly would submit in Response that in addition to *res judicata* not applying to his case, both the *Hoskins* court and the *Howard* court overlooked the statutory requirement found at KRS 61.665(3)(d) that the Board base its decisions on the record as a whole – which in Mr. Wimberly's case included the record from his first hearing, which was introduced into the record of his reapplication hearing without objection from the Retirement Systems, as well as the new evidence introduced at his reapplication hearing[8].

[8] *Kentucky Unemployment Ins. Com'n v. Landmark Community Newspapers of Kentucky, Inc.*, Ky., 91 S.W.3d 575 (2002) holds that in order for an administrative agency's

The Court of Appeals, therefore, correctly held in Mr. Wimberly's case that:

> The record as a whole in Wimberly's case consisted not only of medical evidence from his second application and hearing, but also the medical evidence from his first application and hearing – all of which was considered by the KERS medical reviewers following the second application and all of which was admitted into the record at his second hearing without any objection from KER.

The Board's Final Order from Mr. Wimberly's first application was Moot.

The Retirement Systems argues that the doctrine of *res judicata* should apply to Mr. Wimberly's reapplication because "the prior administrative proceeding afforded him a full and fair opportunity to litigate the issues and ***a final order*** was rendered." *Kentucky Comm'n on Human Rights v. Lesco Mfg. & Design Co.*, 736 S.W.2d361 (Ky.App. 1987). Emphasis added.

The problem with this argument is that a "final order" had not been rendered when Mr. Wimberly filed his reapplication for disability benefits.

Rather, as the record shows, when Mr. Wimberly filed his reapplication [which the Retirement Systems accepted without objection] on June 4, 2004, the Retirement Systems had not yet entered a final order regarding his first application and would not do so until July 28, 2004.

Mr. Wimberly would therefore submit that his reapplication on June 4, 2004, rendered the Retirement Systems' "final order" of July 28, 2004 moot and of no force and effect and therefore was not a "final order" within the meaning of *Lesco*.

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decision to be upheld on appellate review, the agency must have applied the correct rule of law to the facts found.

By ignoring the requirement of KRS 61.665(3)(d) that the Board must base its decisions on the record as a whole, the *Howard* court clearly did not apply the correct rule of law to the facts found in that case.

Since there was no appealable final order entered regarding Mr. Wimberly's first application, the Retirement Systems' argument that *res judicata* should have been applied to his case must fail.

Requirement to Appeal.

At page 10 of its Brief for Appellants, the Retirement Systems cites *Holland* for the holding that:

> [B]ecause Holland did not appeal from the board's order adopting the hearing officer's conclusion, this finding is *res judicata.*

This holding by *Holland* though raises the question of what happens if a claimant does appeal the board's final order denying his first application for disability retirement benefits - i.e. if a claimant does appeal the Board's final order denying his first application for disability retirement benefits, can the claimant file a reapplication for benefits while his appeal is pending?

Mr. Wimberly would submit that if a claimant has appealed a final order of the Board regarding his first application, the Retirement Systems would have lost jurisdiction to hear a reapplication.

Beyond that, even if the Retirement Systems retained jurisdiction to hear a reapplication while an appeal was pending, Mr. Wimberly would submit that pursuing a reapplication while an appeal was pending would not be an economical use of limited judicial resources and could not be what the legislature intended when drafting KRS 61.600(2) – with a reasonable question being: Why would the Franklin Circuit Court want to spend time hearing an appeal when a reapplication was pending – and why would the Retirement Systems want to process a reapplication when an appeal was pending?

Record as a Whole.

The Retirement Systems also cites *Howard* at page 10 of its brief for the holding that:

> [I]t must also be noted that because this is Howard's second application for benefits, *res judicata* applies; therefore, we only review denial of benefits as it related to the new evidence submitted with the second application.

As has been explained above, though, KRS 61.665(3)(d) requires that the Board's final decisions be base upon the record as a whole.

In Charles Wimberly's case, his first application was supported by all his medical records generated through the date of his first hearing. These medical records provide the **only** medical evidence showing Mr. Wimberley's medical history both before and after he was forced to stop working, the cause and nature of his disabling medical conditions, and the medical and functional impairments which prevented him from performing his job duties.

These "old" records were generated contemporaneously when Mr. Wimberley was treated, examined, or evaluated and cannot be duplicated or replicated and provided the fact finder with the only whole picture of Mr. Wimberly's health and medical problems upon which to base a determination of Mr. Wimberley's entitlement to disability benefits in his second application.

If these records were not considered by the second hearing officer, the only evidence of Mr. Wimberly's disability would be the new medical records submitted with his second application, generated long after the one year anniversary of his last day of paid employment. These new records of course would not include any of the medical records previously submitted which showed Mr. Wimberly's condition during the

operative 12 month period following his last day of paid employment. And without those records, how could Charles Wimberly, or any claimant who files a second application pursuant to the statute, ever hope to show his disability during the operative one year period? The answer is simple. He could not. This reality flies in the face of the retirement systems' reapplication statute.

Res judicata is designed to prevent duplicative adjudication of controverted issues. The doctrine, though, only applies to evidence involved in a first adjudication if a subsequent readjudication is not permitted by law or order. In Charles Wimberly's case he reapplied for disability retirement benefits pursuant to KRS 61.600(2) and with his second application submitted new medical evidence as required by the statute.

If Mr. Wimberly had failed to submit new medical evidence, *res judicata* would of course have applied because he would have failed to have complied with the statute and, from a practical perspective, there would have been no new evidence which would have in any way affected the decision in the first application.

However, Mr. Wimberly **did** comply with the statute, he **did** submit new evidence, and he **was** entitled to have his claim considered on the basis of the entire record - "the record as a whole", as provided by KRS 61.665(3)(d).

Again, the core issue in every retirement disability case is whether an applicant is incapacitated from his job for the required twelve month post-employment period. That issue is present in a claimant's first application and remains present in every permitted subsequent reapplication. If the Board finds that the evidence submitted by a claimant's first application is insufficient to prove any element necessary to establish entitlement of disability benefits, the statute gives the claimant the right to file a reapplication and with it

to supplement the evidence previously submitted with new objective medical evidence relating to disability.

New Evidence.

As mentioned above, the Retirement Systems cited *Howard* at page 10 of its brief for the holding that:

> [I]t must also be noted that because this is Howard's second application for benefits, *res judicata* applies; therefore, we only review denial of benefits as it related to the new evidence submitted with the second application.

If by citing this portion of *Howard*, the Retirement Systems is arguing that its Board erred when its own hearing officer did not limit his review to the new evidence that was introduced at Mr. Wimberly's reapplication hearing, but also reviewed Mr. Wimberly's old evidence from his first hearing in order to make a final decision – then this is a curious argument to make.

Mr. Wimberly would submit in response that no error was committed when the Retirement Systems' hearing officer did not limit his review to only Mr. Wimberly's new evidence, but also reviewed Mr. Wimberly's "old" evidence from his first hearing as required by KRS 61.665(3)(d) which requires that the Board's final decisions be based on the record as a whole.

Issue Preservation Argument.

The Retirement Systems argues next that:

> The Court of Appeals erred when it failed to properly apply established case law with regard to issue preservation, and consequently, erroneously considered an unpreserved argument.

The "unpreserved argument" that the Retirement Systems is referring to is Mr. Wimberly's argument that alcoholism is a behavior and not a condition.

The Retirement Systems cites a number of case in support of its argument – i.e. *Hollen v. Kentucky Retirement Systems*, 2009-CA-000119-MR (Ky. App. 2010); *Burns v. Level*, 957 S.W. 2d 218, 222 (Ky. 1997); *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8 ((Ky.2011); *Givens v. Conley*, 288 S.W. 3d 454 (Ky. App. 2011); *Challinor v. Axton*, 54 S.W.2d 600, 601 (Ky. 1932); *West v. Kentucky Retirement Systems*, 413 S.W. 3d 578 (Ky. 2013); *Wilmer Robinson v. Kentucky Retirement Systems*, 2014-CA-000152-MR (Ky.App., 2015); *Kentucky Retirement Systems v. Stewart*, 2011-CA-MR; *Personnel Board v. Heck*, 725 S.W.2d 13 (Ky. App. 1987); *Rapier v. Philpot*, 130 S.W. 3d 560 (Ky. 2004).

None of these cases, though, are applicable to Mr. Wimberly's case, because as shown above, Mr. Wimberly clearly preserved the issue of alcoholism being a behavior and not a condition in the exceptions that he filed to the hearing officers' Report.

Mr. Wimberly, therefore, submits that the Court of Appeals correctly rejected the Retirement Systems' issue preservation argument, when it held at pages 14 -15 of its Opinion Affirming, as follows:

> KERS argues that because Wimberly did not preserve the issue of alcoholism as a behavior and not as a condition in his exceptions, and the circuit court did not find that he had preserved the issue, the circuit court should have applied the case law cited [by the Retirement Systems].
>
> Wimberly argues that KERS' assertion that he failed to preserve the issue of alcoholism as behavior, and not a condition, in his exceptions to the hearing officer's recommended order is directly contradicted by the record. In fact, in his exceptions he stated, "The Hearing Officer erroneously characterized the claimant's past potential alcohol abuse as indirectly or directly affecting his cardiac condition. The Hearing Officer relied primarily upon his prior Findings in a prior claim. There was new & material medical proof submitted with the current case that disputed alcoholism."
>
> We agree with Wimberly that we recently held in *Kentucky Retirement Systems v. Stewart*, 2011-CA-001262-MR and 2011-

> CA-001340-MR, that while *Rapier v. Philpot,* 130 S.W.3d 563 (Ky. 2004), requires the filing of exceptions, "[t]he *Rapier* case dealt with a situation where no exceptions had been filed, not one where exceptions had been filed but an issue had not been raised. Since the circuit court is hearing an original action, there is no requirement that issues be preserved for appeal." In the instant case, the record reflects that Wimberly preserved the issue of alcoholism as behavior and not a condition in his exceptions to the hearing officer's recommended order.
>
> Based on the evidence, we simply cannot say that the circuit court's opinion that *res judicata* did not apply in this particular case to bar Wimberly's second application for disability benefits was in error. Wimberly proved by new objective medical evidence that he was disabled and was therefore prohibited from performing the essential functions of his position as a commercial bus operator.
>
> Furthermore, the issue of alcoholism as a behavior was properly raised before the circuit court.

Alcohol as a Pre-Existing Condition Argument.

Charles Wimberly would submit that the Retirement Systems' argument that alcoholism is a pre-existing condition for purposes of disability retirement cases must fail because the Retirement Systems failed to raise this issue before the Court of Appeals.

KRS 61.600(3)(d), provides that a person – such as Mr. Wimberly - with less than 16 years of service shall not be eligible for disability retirement benefits if the person's incapacity results directly or indirectly from bodily injury, mental illness, disease, or condition which pre-existed membership in the system.

In Mr. Wimberly's case, the Retirement Systems denied Mr. Wimberley's claim for disability retirement benefits because it's hearing officer incorrectly found that Mr. Wimberly's disabling heart condition was indirectly related to alcohol usage.

Mr. Wimberly, though, filed exceptions to the hearing officer's finding regarding the pre-existing condition issue as follows:

> The Hearing Officer erroneously characterized the claimant's past potential alcohol abuse as indirectly or directly affecting his cardiac condition. The Hearing Officer relied primarily upon his

> prior Findings in a prior claim. There was new & material medical proof submitted with the current case that disputed alcoholism.

In the Opinion and Order that the Circuit Court issued following its grant of Mr. Wimberly's Motion to Amend, Alter or Vacate, the Circuit Court held that:

> Alcohol consumption is not a condition within the meaning of KRS 61.600(3)(d). In *Kentucky Retirement Systems* v. *Brown,* 336 S.W.3d 8 (Ky. 2011)[5], the Kentucky Supreme Court set forth the appropriate standard governing pre-existing conditions. In that case, the Retirement Systems had denied benefits to the claimant on the grounds that his COPD was caused by his smoking habit. The Supreme Court construed the term "condition" and held that "the word 'condition' follows the words bodily injury, mental illness, and disease. KRS 61.600(3)(d). Thus, interpreting 'condition' as of the same kind or nature as the terms 'bodily injury,' 'mental illness,' and 'disease,' we cannot conclude that the word 'condition' encompasses 'behavior.'" *Brown,* 336 S.W.3d at 16. Accordingly, the Court held that smoking was not a condition within the meaning of KRS 61.600(3) (d) but rather that smoking was a behavior.
>
> Just as in *Brown,* it was error for the Retirement Systems to classify as a condition barring recovery any alleged alcohol abuse by Wimberly prior to his membership date. Applying the correct standard, it is clear that regardless of whether Wimberly ever abused alcohol, such activity could never constitute a condition as contemplated in KRS 61.600(3)(d).

In footnote #5 of its Opinion and Order the Circuit Court noted that:

> [5] The Supreme Court had not issued its Opinion in *Brown* at the time of the administrative hearing in this case. The Retirement Systems maintains on appeal that it is improper to apply this new standard because Wimberly did not preserve the issue for appeal. Wimberly maintains that the issue was preserved in his Exceptions. This Court finds application of the Supreme Court's holding in *Brown* to be appropriate in this case. Wimberly properly preserved the issue of pre-existing condition for review, and the Court of Appeals' recent decision of *Hollen* v. *Kentucky Retirement Systems,* 2009-CA-0001119-MR (Ky. Ct. App. 2010) dictates that application of *Brown* is appropriate. Emphasis added.

In footnote #6 of its Opinion and Order the Circuit Court noted that:

> [6] Moreover, Wimberly had not even been diagnosed with the very conditions the Retirement Systems allege to have followed, albeit indirectly at best, from such conduct.

In its appeal to the Court of Appeals, the Retirement Systems argued - not that the Circuit Court had erred in holding that alcohol use was a behavior and not a condition – but argued instead that the Circuit Court erred by failing to apply existing law as it applies to issue preservation of new precedent, as follows:

> Furthermore, Franklin Circuit Court erred when it ignored existing law on issue preservation when there is new law. Franklin Circuit Court based a large portion of its decision on the issue of alcohol consumption and pre-existing conditions. (Franklin Circuit Court February 28, 2013 Opinion and Order, pp. 6-7). However, as the lower court correctly notes, the case of Kentucky Retirement Systems v. Brown, 336 S.W.3d 8 (Ky. 2011) had not been issued when the Systems' determination was made. As such, there was no error by the Systems in not applying this standard. Franklin Circuit Court erred when it did not follow existing published case law which clearly holds that the failure to raise an issue before an administrative body precludes a litigant from asserting that issue in an action for judicial review of that agency's decisions. Personnel Board v. – 12 - Heck, 725 S.W.2d 13 (Ky. App. 1987). Franklin Circuit Court also erred in failing to apply the recent case of Hollen v. Kentucky Retirement Systems. 2009-CA-000119-MR (Ky. App. 2010)(cited pursuant to CR 76.28(4)(c) and attached hereto as Appendix M), which addressed the very issue of preservation as it applies to new precedent. In Hollen. this Honorable Court cited Burns v. Level. 957 S.W.2d 218, 222 (Ky. 1997) and held that a new precedent should not be retroactively applied unless the subject issue was preserved for review. The Appellee did not preserve the issue of alcoholism as behavior, and not condition, in his exceptions and Franklin Circuit Court made no finding that he preserved the issue. As such, the law as cited above should have been applied by Franklin Circuit Court, and its failure to do so is in error. Regardless, the pre-existing nature of the Appellee's conditions is not outcome determinative because Appellee did not meet his burden to prove by new objective evidence not previously considered that he was incapacitated from performing his job duties or a job of like duties since his last day of paid employment as required in KRS 61.600(2). Appellee must first prove an incapacity, and he failed to do so.

Therefore, as can be easily seen, the Retirement Systems failed to raise or argue the question of whether alcohol consumption was a condition or a behavior before the Court of Appeals.

In its Opinion Affirming, the Court of Appeals correctly held as follows:

> KERS next argues that that the circuit court erred by failing to apply existing law as that law applies to issue preservation of new precedent. KERS contends that the circuit court based a large portion of its decision on the issue of alcohol consumption and preexisting conditions. However, as the circuit court noted, the case of *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8 (Ky. 2011), had not been issued when the KERS' determination was made in the instant case. As such, there was no error by KERS in not applying this standard. KERS argues that the circuit court erred when it did not follow existing published case law that clearly holds that the failure to raise an issue before an administrative body precludes a litigant from asserting that issue in an action for judicial review of that agency's decisions. *Personnel Board v. Heck*, 725 S.W.2d 13 (Ky. App. 1987). KERS argues that the circuit court also erred in failing to apply the recent case of *Hollen v. Kentucky Retirement Systems*, 2009-CA-000119-MR (Ky. App. 2010), which addresses the issue of preservation as it applies to new precedent. In *Hollen*, this Court cited to *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997), and held that a new precedent should not be retroactively applied unless the subject issue was preserved for review. KERS argues that because Wimberly did not preserve the issue of alcoholism as a behavior and not as a condition in his exceptions, and the circuit court did not find that he had preserved the issue, the circuit court should have applied the case law cited above.
>
> Wimberly argues that KERS' assertion that he failed to preserve the issue of alcoholism as behavior, and not a condition, in his exceptions to the hearing officer's recommended order is directly contradicted by the record. In fact, in his exceptions he stated, "The Hearing Officer erroneously characterized the claimant's past potential alcohol abuse as indirectly or directly affecting his cardiac condition. The Hearing Officer relied primarily upon his prior Findings in a prior claim. There was new & material medical proof submitted with the current case that disputed alcoholism."
>
> We agree with Wimberly that we recently held in *Kentucky Retirement Systems v. Stewart*, 2011-CA-001262-MR and 2011-CA-001340-MR, that while *Rapier v. Philpot*, 130 S.W.3d 563 (Ky. 2004), requires the filing of exceptions, "[t]he *Rapier* case dealt with a situation where no exceptions had been filed, not one

> where exceptions had been filed but an issue had not been raised. Since the circuit court is hearing an original action, there is no requirement that issues be preserved for appeal." In the instant case, the record reflects that Wimberly preserved the issue of alcoholism as behavior and not a condition in his exceptions to the hearing officer's recommended order.

As can be seen, then, since the Retirement Systems did not raised and did not argue the question of whether alcohol consumption was a behavior or a condition before the Court of Appeals - the Court of Appeals did not rule on that question.

Instead, since the only question regarding pre-existing conditions that the Retirement Systems did raise and did argue before the Court of Appeals was the question of whether Mr. Wimberly had preserved the issue by filing exceptions – that was the only question that was ruled on in a majority opinion by the Court of Appeals.

Yet, even though the question of whether alcohol consumption was a condition or a behavior was not before the Court of Appeals, Judge VanMeter, for unknown reasons, took it upon himself to write a dissent in which he relied on evidence not in the record to support his opinion that the court of Appeals should reverse the Franklin Circuit Court's Opinion and Order and remand Mr. Wimberly's case to the circuit court with direction to reinstate the Retirement Systems' denial of Mr. Wimberly's claim[9].

The Retirement Systems now argues: "[t]he dissent in the Court of Appeals' Opinion regarding the issue of alcoholism as a pre-existing condition should be given

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[9] Judge VanMeter improperly based his opinion that alcohol use is a psychiatric disorder on the *Diagnostic and Statistical Manual of Mental Disorders* (Am. Psychiatric Publ'g, 5th Ed., 2013) ("DSM-5") – when reference to that manual was not part of the record as a whole and was not relied on by the Retirement Systems as a basis for denying Mr. Wimberly's claim. The case of *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8. __ (Ky. 2011), however holds that a medical treatise or article alone, written in the abstract, is never sufficient to qualify as objective medical evidence . KRS 13B .090(1) ; KRE 803(18).

further consideration as a clarification of this Honorable Court's holding in *Kentucky Retirement Systems v. Brown,* 336 S.W.3d 8 (Ky. 2011)" – even though the question of whether alcohol consumption was a condition or a behavior had not been raised or argued before or decided by the Court of Appeals.

In his Dissent Judge Van Meter states:

> I dissent. In my view, the trial court erred in its conclusion of law that alcohol abuse can never constitute a preexisting condition.

Mr. Wimberly would submit that it should first be noted that Judge Van Meter improperly based his opinion that alcohol use is a psychiatric disorder on the *Diagnostic and Statistical Manual of Mental Disorders* (Am. Psychiatric Publ'g, 5th Ed., 2013) ("DSM-5") – when: (1) reference to that manual was not part of the record as a whole; and (2) was not relied on by the Retirement Systems as a basis for denying Mr. Wimberly's claim; and (3) was not objective medical evidence. See the case of *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8 (Ky. 2011) which holds that a medical treatise or article alone, written in the abstract, is never sufficient to qualify as objective medical evidence . See also *Kentucky Retirement Systems v. Bowens*, 281 S.W.3d776, 783 (Ky. 2009) and *Kentucky Retirement Systems v. Dillard Wayne Brown*, 336 S.W.3d 8, 14 (Ky. 2011) – which both hold that the Retirement Systems' decisions must be supported by objective medical evidence.

Mr. Wimberly would further submit that pursuant to KRS 61.600(3)(d), it was his burden to prove by a preponderance of objective medical evidence that his disabling heart condition was not related to a pre-existing condition. It was not, though, Mr. Wimberly's burden to prove that that alcohol use, consumption, or even abuse can never constitute a pre-existing condition.

But, as Judge Van Meter, admitted himself in his Dissent – Mr. Wimberly was presented with an almost insurmountable difficulty in proving that his disabling heart condition was not related to pre-employment alcohol use:

> Admittedly, this burden of proof would seem to present an almost insurmountable difficulty for Wimberly and other similarly situated claimants. Rhetorically, how does one prove when his or her mere alcohol use became a disorder, a mental illness or disease? See page 19 of the Court of Appeals Opinion Affirming.

Here, though, is how Charles Wimberly, in spite of the almost insurmountable difficulty facing him, proved that his disabling heart condition was not related to pre-employment alcohol use - he put on evidence that showed that:

- his membership date was in September 1991.
- his Kentucky Transportation Cabinet Physical Examination Form which was conducted contemporaneously with his membership date of September 1991, Dr. Miles Snowden - who was retained by the State - found Charles to be in satisfactory general health with no reported history of cardiovascular disease. (page 843).
- a July 10, 1990 Lab test showed normal liver function. (page 852).
- a September 1998 CT of the abdomen showed that his liver appeared normal. (page 852).
- an August 19, 2002, report from Dr. John T. Kenny shows that Charles was not actually diagnosed with having cardiomyopathy and congestive heart failure until March 16, 2002 – long after his membership date of September 1991. (page 290).
- a December 1, 2004, report from Dr. John Arnett stated that: The fact that the CT scan of the abdomen in 1998 showed a normal liver and that numerous LFTs over the years since 1993 have been normal further suggests that Mr. Wimberly has not been a heavy drinker. (page 852).

Judge Van Meter, on the other hand, based his Dissent on the hearing officer's finding

that:

> There is little doubt that the Claimant used alcohol prior to his initial employment date. Counsel for the Systems has pointed out that Mr. Wimberly had stated to Dr. Kinney that he was drinking at least a case of beer a week. This report was made on March 16, 2002 under social security history, page 135. The Claimant also admitted to heavy alcohol abuse in the past.
> The previous hearing decision, as noted in undersigned's decision, made a finding of fact stating as follows:
>
> > The evidence suggests that it is likely that the conditions from which Claimant suffers including diabetes and cardiac problems, are the results of conditions which pre-existed the membership in the systems. (Finding of Fact No. 4, Page 540 of Record).
>
> That decision in a discussion of the evidence and testimony stated on the same page:
>
> > In addition, the treating physicians note throughout the record that claimant's cardiac problems are likely the result of alcohol use, a situation which predates his membership in the systems.
>
> The record does not indicate that there was a determination that Mr. Wimberly was an alcoholic, but the record does reflect that he reported to his doctor that he abused alcohol.
> Accordingly, it is found that the Claimant's use of alcohol, which existed prior to his initial employment date, indirectly, if not directly, affected his cardiac condition, as evidenced by the previous findings of the undersigned Hearing Officer and statements of doctors prior to the second hearing of the Claimant.

The problem with Judge Van Meter's reliance on the hearing officer's findings is that, although there is evidence of Mr. Wimberly's use of alcohol in the record, there is no report from any of Mr. Wimblerly's doctors that state that his disabling heart condition was related to pre-employment alcohol use, consumption, or even abuse.

For example, Dr. Kinney's report was made in 2002 – eleven years after Mr. Wimberly's employment date of 2011, and although Mr. Wimberly may have been

drinking a case of beer a week in 2002 – there is no evidence in the record to suggest that he was drinking that much beer prior to 1991.

Additionally, the hearing officer's finding that Mr. Wimberly admitted to heavy alcohol abuse in the "past" is of no consequence, because there is no evidence in the record to show if " in the past" extended back to the time prior to his employment date of 1991.

Further, neither Judge Van Meter nor either hearing officer have cited any objective medical evidence that would explain how Mr. Wimberly's disabling heart condition could be related to pre-employment alcohol usage, when his heart conditions was not diagnosed until 2002 - 11 years after his employment date of 1991.

In the absence of any such evidence, it was just as likely that Mr. Wimberly's disabling heart condition was related to post-employment alcohol usage – as opposed to pre-employment alcohol usage.

Finally, Judge Van Meter states that:

> The hearing officer, as fact-finder, was within his prerogative to believe the doctors' original reports as to Wimberly's mental illness or disease of alcohol abuse, as opposed to those which sought to "clarify" the record.

The case of *Kentucky Retirement Systems v. Dillard Wayne Brown*, 336 S.W.3d 8, 14 (Ky. 2011), however, holds that:

> In reaching its determination whether a condition is pre-existing, the Kentucky Retirement Systems must base its decision under the guidance of KRS 61.600(3), which requires the evaluation of "objective medical evidence." Objective evidence, as defined by our legislature, means:
>
> > reports of examinations or treatments ; medical signs which are anatomical, physiological, or psychological abnormalities that can be observed; psychiatric signs which are medically demonstrable phenomena indicating specific abnormalities of

> behavior, affect, thought, memory, orientation, or contact with reality; or laboratory findings which are anatomical, physiological, or psychological phenomena that can be shown by medically acceptable laboratory diagnostic techniques, including but not limited to chemical tests, electrocardiograms, electroencephalograms, X-rays, and psychological tests[.] KRS 61 .510(33) .

There is, however, no objective medical evidence in the record to support a finding that Mr. Wimberly's alcohol consumption was either a mental illness or a disease of alcohol abuse.

Further, KRS 61.600(3) clearly provides that the Retirement Systems determinations are to be based upon the examination of the objective medical evidence by licensed physicians –and just as clearly neither Judge Van Meter nor either of the Retirement Systems' hearing officers are licensed physicians.

The Retirement Systems' Substantial Evidence Argument.

The Retirement Systems final argument is that:

> The Court of Appeals erred in concluding that the Agency's findings were not supported by substantial evidence.
> While Movants recognize that substantial evidence is not a significant issue of law in and of itself for discretionary review, the Court of Appeals' erroneous application of the law as discussed more fully above has resulted in the misanalysis of the substantial evidence standard. In finding that the Agency's conclusions were not supported by substantial evidence of record, the Court of Appeals reconsidered evidence that was noted by the Hearing Officer to be duplicative of that submitted with the first application, and therefore, was properly not reconsidered under the doctrine of administrative **res judicata,** as discussed more fully above.

Mr. Wimberly would submit in response that as correctly held by the Court of Appeals in its Affirming Opinion: (1) the doctrine of administrative *res judicata* was not applicable to the facts found in Mr. Wimberly's case – because he submitted new

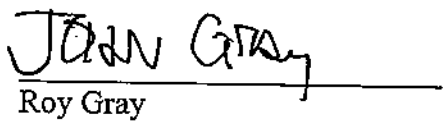
objective medical evidence along with his reapplication in compliance with KRS 61.600(2) which showed that he was permanently disabled and that his disability was not related to a pre-existing condition; and (2) the Appeals Committee was required by KRS 61.665(3)(d) to consider the record as a whole – which included the evidence of record from Mr. Wimberly's first hearing. See page 10 – 13 of the Court of Appeals Opinion Affirming which correctly holds that:

> We note that a consideration of a second application necessarily requires consideration both of the new medical evidence and the evidence in support of the first application. In *Hoskins*, which KERS argues controls here, the Board concluded that the claimant's second application for disability retirement benefits was barred by *res judicata*. In Wimberly's case, there was no such conclusion by the Board. The agency did not raise the issue of *res judicata* at the second administrative hearing or object to the introduction and consideration of the medical evidence from Wimberly's first application by the second hearing officer, whose recommended order reflected his consideration of that evidence. Further, as the circuit court noted, KRS 61.665(3)(d) requires that a final order of the Board shall be based on substantial evidence appearing in the record as a whole.
>
> The record as a whole in Wimberly's case consisted not only of medical evidence from his second application and hearing, but also the medical evidence from his first application and hearing—all of which was considered by the KERS medical reviewers following the second application and all of which was later admitted into the record at his second hearing without any objection from KERS.
>
> The evidence in this case overwhelmingly demonstrates that from his last day of paid employment on July 25, 2002, Wimberly was continuously medically disabled from driving a public transportation bus for twelve consecutive months and beyond. Due to his cardiac condition, its symptoms, as well as concerns over Wimberly's ability to safely operate a bus, his physicians would not clear him to return to commercial driving and, without medical clearance from his physicians, TARC would not let Wimberly drive its buses. In fact, in response to Wimberly's condition and restrictions, on February 24, 2003, Wimberly's employer completed a "Reasonable Accommodation Determination" form, stating: "Based on medical documentation it has been determined that the above employee is unable to perform the essential functions of the position of Coach Operator."

CONCLUSION

Based on all of the above, the Kentucky Supreme Court should hold that res judicata did not apply to Mr. Wimberly's case and that Mr. Wimberly proved his entitlement to disability retirement benefits.

Respectfully submitted,



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